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14 IN THE UNITED STATES DISTRICT COURT
15 FOR THE DISTRICT OF ARIZONA

17 United States of America,

18 Plaintiff,

19 v.

20 Michael Lacey, et al.,

21 Defendants.

CR-18-422-PHX-SMB

UNITED STATES' RESPONSE TO
MOTION TO COMPEL DISCOVERY
[CR 643]

Oral Argument:
Sept. 13, 2019, 11:00 a.m.

24 **INTRODUCTION**

25 In the nearly 16 months since indictment, the government has taken numerous steps
26 to provide Defendants with early and broad Rule 16 discovery, including the production of
27 more than 7.8 million documents in searchable electronic format. To facilitate Defendants'
28 review of this evidence, the government has: (1) provided indices with descriptions

1 identifying the sources of produced items and Bates number references to allow Defendants
2 to focus their review; (2) disclosed a subset of “hot” documents that support the allegations
3 in the indictment; (3) disclosed subsets of “hot” documents to various defense counsel
4 regarding the allegations contained in the indictment against their respective clients; (4)
5 produced ads concerning victims in the indictment; (5) made available a Department of
6 Justice (DOJ) discovery specialist to assist with technical questions; (6) provided a
7 preliminary witness and exhibit list more than 13 months prior to trial; (7) disclosed a large
8 portion of *Jencks* statements more than a year before trial; and (8) offered to meet with
9 counsel for a number of Defendants to discuss the government’s theory of the case, key
10 evidence, and the allegations against Defendants in great detail.

11 The government has also exceeded its Rule 16 discovery obligations in its handling
12 of any potentially material Backpage.com server data in its possession. Although
13 Defendants—who owned and operated Backpage for most of its 14-year existence—were
14 undoubtedly aware of the nature of the content hosted on Backpage’s servers, the
15 government provided Defendants with: (1) documents specifically describing the function
16 of Backpage.com servers; (2) copies of all of the ads and images that were on
17 Backpage.com at the time the website shutdown in April 2018; (3) copies of Backpage.com
18 ads (and underlying data) associated with Counts 2-51 in the superseding indictment as
19 those ads (and underlying data) appear in the server data; and (4) email data on the
20 Backpage.com servers. The government is currently imaging payment processing
21 transactional data from the Backpage.com servers and will make that data available to
22 Defendants as soon as the imaging process is complete. The government has also informed
23 Defendants that it would provide them with exhibits of any of the aforementioned server
24 data it might utilize at trial.

25 Notwithstanding these efforts, Defendants have filed a motion to compel that asserts
26 two baseless demands: (1) the government produce Backpage server data in Defendants’
27 preferred format—a format the government neither has nor can obtain for its own case
preparation; and (2) the government affirmatively search discovery to single out every

1 piece of potentially exculpatory evidence. In essence, Defendants request the Court
2 compel the government to conduct *Defendants'* investigation (to include analyzing
3 Defendants' evidence) and prepare Defendants' defense for trial. Yet, courts have
4 repeatedly held that the government is not obliged to produce discovery to Defendants in
5 a format that the government does not have, nor is it compelled to point Defendants to
6 potentially exculpatory evidence within a larger mass of disclosed evidence. Defendants
7 seek to impose burdens on the government that are far outside the normal practice in this
8 district, inconsistent with national e-discovery protocols, and well exceed what the law
9 requires. Their motion should be denied.

10 **ARGUMENT**

11 **I. THE GOVERNMENT HAS FULLY COMPLIED WITH ITS RULE 16
12 DISCOVERY OBLIGATIONS AND THE ESI PROTOCOL.**

13 Rule 16(a)(1)(E) of the Federal Rules of Criminal Procedure addresses the discovery
14 of documents and tangible objects in criminal cases. Rule 16(a)(1)(E) provides that on a
15 defendant's request, the government must permit the defendant to inspect . . . data, . . .
16 tangible objects, . . . or copies or portions of any of these items, if the item is within the
17 government's possession, custody, or control" and "the item is material to preparing the
18 defense." *United States v. Clegg*, 740 F.2d 16, 18 (9th Cir. 1984); *see also United States*
19 *v. Santiago*, 46 F.3d 885, 893 (9th Cir. 1995); *United States v. Jordan*, 316 F.3d 1215 (11th
20 Cir. 2003).

21 In 2012, the Administrative Office of the U.S. Courts published "Recommendations
22 for Electronically Stored Information (ESI) Discovery Production in Federal Criminal
23 Cases" (commonly referred to as the "ESI Protocol"), available at
24 <http://www.uscourts.gov/sites/default/files/finalesiprotocolbookmarked.pdf>. The ESI
25 protocol states that (1) the parties should meet at the outset of the case to "discuss what
26 formats of production are possible and appropriate. . . . Any format selected for producing
27 discovery should maintain the ESI's integrity, allow for reasonable usability, and
28 reasonably limit costs, and, if possible, conform to industry standards for the format"; and

1 (2) that “[w]hen producing ESI discovery, a party should not be required to take on
2 substantial additional processing or formatting conversion costs and burdens beyond what
3 the party has already done or would do for its own case preparation or discovery
4 production.” ESI Protocol, Introduction at 1-2 (summarizing Principles 4 and 5). The ESI
5 Protocol also suggests that, even if a case involves millions of pages of discovery, the
6 government does not have any special *Brady* obligations so long as it produces the ESI in
7 a searchable format, provides a table of contents, and produces a subset of “hot”
8 documents.” ESI Protocol, Strategies at 2 & n.1.

9 The government has far exceeded its Rule 16 obligations and has complied with the
10 ESI Protocol in this case. To start, although Rule 16 only requires that the government
11 permit Defendants to inspect and copy discovery material to preparing their defense, the
12 government has spent a significant amount of time and expense to produce discovery to
13 Defendants in the agreed-upon, electronic, searchable, industry-standard format.
14 Moreover, the government created indices denoting the source from which discovery was
15 obtained to assist Defendants in navigating these materials. Furthermore, the government
16 provided the vast majority of discovery (approximately 90%) to Defendants two years in
17 advance of trial, produced subsets of “hot” documents that support the allegations in the
18 superseding indictment, and provided counsel for a number of Defendants with subsets of
19 “hot” documents specifically related to the allegations in the superseding indictment
20 against their respective clients. (*See* CR 444; Exhibits D-I.) The government has also
21 offered to meet and met with several Defendants to discuss its theory of the case and the
22 allegations against Defendants in detail. *Id.* Additionally, on February 22, 2019 (more
23 than 14 months before trial), the government provided Defendants a large portion of *Jencks*
24 statements. (*See* CR 524; Exhibit A.)

25 Moreover, on April 1, 2019 (more than 13 months before trial), the government
26 provided Defendants a preliminary witness and exhibit list that it has continued to update
27 and periodically disclose. (*See* CR 511.) A vast majority of the government’s exhibits are
28 documents Backpage disclosed to the Senate Permanent Subcommittee in 2016 as part of

1 the Senate's investigation into Backpage¹, and were subsequently compelled by this Court
 2 to be produced to the government in September 2017 as part of the USAO 108 grand jury
 3 subpoena litigation. (See CR 444, Exhibit B.) Defendants' attempt to write-off the
 4 government's re-production of these trial exhibits by asserting "Defendants are not
 5 Backpage" and "Defendants did not produce these documents nor can the government
 6 avoid its discovery obligations by pretending otherwise" is ineffective. (Mot. at 17.) First,
 7 more than a year ago, the government disclosed to Defendants all documents Backpage
 8 produced in September 2017. Second, as the government emphasized in its January 18,
 9 2019 and April 16, 2019 status reports (CRs 444 and 524), and its May 31, 2019 email and
 10 June 3, 2019 letter to Defendants (May 31, 2019 email, Exhibit A; June 3, 2019 letter, CR
 11 643-3), these documents were Bates labeled and produced to the government by Davis
 12 Wright Tremaine (DWT)—the same law firm (and firm counsel) that represented
 13 Backpage in connection with its compelled production of these documents to the Senate
 14 and Arizona grand jury, and the same law firm (and law firm counsel) jointly representing
 15 Defendants Lacey and Larkin in this case. The government does not think it presumptuous
 16 to believe DWT is aware of these documents and in a position to discuss their contents
 17 with other defense counsel in this case, particularly in light of the fact that most defense
 18 counsel are actively engaged in a joint defense agreement.

19 **II. THE GOVERNMENT PRODUCED MATERIAL BACKPAGE SERVER**
 20 **DATA TO DEFENDANTS IN THE SAME MANNER IT WAS RECEIVED**
BY THE GOVERNMENT.

21 The United States Supreme Court has interpreted "material to preparing the
 22 defense" to solely involve "the defendants' response to the Government's case in chief."
 23 *United States v. Armstrong*, 517 U.S. 456, 462 (1996). Thus, "[w]hile it might be argued
 24 that as a general matter, the concept of a 'defense' includes any claim that is a 'sword,'
 25 challenging the prosecution's conduct of the case, the term may encompass only the

26
 27
 28 ¹ Declaration of Breena Ross, *Senate Permanent Subcommittee on Investigations v. Carl Ferrer*, Misc. No. 1:16-mc-00625-RMC (D.D.C. Nov. 30, 2016).

1 narrower class of ‘shield’ claims, which refute the Government’s arguments that the
 2 defendant committed the crime charged.” *Id.* As the moving party, Defendants bear the
 3 burden of showing the elements of Rule 16 (possession and materiality). *See United States*
 4 *v. Goris*, 2017 WL 5663479, at *45 (1st Cir. Nov. 27, 2017). A showing of materiality
 5 requires “some indication” that pretrial disclosure of the information sought “would have
 6 enabled the defendant significantly to alter the quantum of proof in his favor.” *Id.* A
 7 general description of the item will not suffice; neither will a conclusory argument that the
 8 requested item is material to the defense. *See United States v. Cadet*, 727 F.2d 1453, 1466
 9 (9th Cir. 1984); *United States v. Carrasquillo-Plaza*, 873 F.2d 10, 12-13 (1st Cir. 1989).

10 **A. Government’s Production of Server Data**

11 The government’s May 31, 2019 status report specifically described the roles of the
 12 servers that hosted the Backpage.com website. (*See CR 626-4* at 11.) As detailed in this
 13 report, on March 8, 2019, the government provided Defendants with copies of the master
 14 database servers and image servers (*i.e.*, all of the ads and images that were on
 15 Backpage.com at the time the website was seized and shutdown). (*See CR 626* at 3; 626-
 16 4 at 22.) Therefore, Defendants’ assertion that “the government does not provide copies
 17 of the ads about which it complains—but merely offers its characterizations of ads on
 18 Backpage.com and practices of the website” is incorrect. (Mot. at 15.) While the
 19 government had hoped to preserve the servers in the Amsterdam Switch data center to
 20 improve the possibility of being able to more easily search and display ads as they would
 21 have appeared when the Backpage.com site was active, when the Dutch authorities became
 22 aware of the allegations contained in the indictment (CR 3), they refused the government’s
 23 request to keep the servers live and demanded they be shut down. (*See CR 626-4* at 8.)
 24 On March 7, 2019, the government made available to Defendants an imaged copy of the
 25 servers containing Backpage email data seized from Dallas, Texas.² *Id.* Moreover, the

27
 28 ² This email data was produced to Defendants in load-ready file format that is searchable.

1 government is currently imaging the payment processing island server that stored all credit
2 card, bitcoin and money order transactions, and the internal applications servers that
3 presented data to Backpage employees and related companies. (*See* CR 626-4 at 16-17.)
4 The government will make this data available to Defendants when processing is complete.³
5 That production will complete the government's disclosure of any potentially material
6 server data.

7 Additionally, Defendants' demand for server data in a "functional format" is
8 unavailing (Mot. at 14-15.) Defendants have had access to all of the ads and images on
9 Backpage at the time the website was seized and shutdown in the same format they were
10 received by the government for months now. That format is "functional." Moreover, on
11 March 15, 2019, the government went a step further to assist Defendants' review of this ad
12 and image data by providing them with underlying data pertaining to all of the ads (and
13 related ads) referenced in the superseding indictment. (*See* CR 524, Exhibit K.) Among
14 other things, this underlying data included ad poster name, ad poster email address, ad post
15 identification number, the date ad was posted, and whether the ad was paid. This disclosure
16 was in addition to the government's previous disclosure of victim ads referenced in the
17 superseding indictment obtained from subpoenas to Backpage in various federal, state, and
18 local sex trafficking investigations. (*See* November 30, 2018 discovery transmittal letter,
19 Exhibit B.) Thus, Defendants' contention that they have to perform a "complicated search
20 through millions of records" to obtain backend administrative data regarding an ad is
21 inaccurate. (Mot. at 7.)

22 Additionally, Defendants' claim that certain ad data could have been accessed "by
23 clicking a hyperlink" before the website was seized and shutdown is inconsequential.
24 (Mot. at 6-7.) Defendants have the server data in a functional format. While this format

26 ³ The government indicated in its May 31, 2019 status memo and at the June 23, 2019
27 status conference that it believed imaging of the payment processing data would be
28 completed by July 15, 2019 (*see, e.g.*, CR 626 at 4); however, the imaging process will
require a few additional weeks. The government will notify the court when this data has
been made available to Defendants.

1 may not be their preferred format for receiving this data, the government has no duty to
2 produce discovery in a format it does not have (nor can obtain in this case). *See United*
3 *States v. Gray*, 648 F.3d 562, 567 (7th Cir. 2011) (“Having turned over the underlying data,
4 the prosecutors had no duty to go further and conduct the defense’s investigation for it.”);
5 *see also United States v. Budovsky*, 2016 WL 386133, at *12 (S.D.N.Y. 2016) (“There is
6 no basis to find here that the government was obliged to produce the discovery to defense
7 in a format that the government did not have.”); ESI Protocol Principle 5 (“When producing
8 ESI, a party should not be required to take on substantial additional processing or
9 formatting costs and burdens beyond what the party has already done or would do for its
10 own case preparation or discovery production.”).

11 **B. Defendants’ Request for Immaterial and Redundant Server Data
12 Should be Denied or in the Alternative, Defendants Should be Ordered
13 to Bear the Production Cost.**

14 Although the government provided Defendants with materials specifically
15 describing the function of the Backpage.com servers, copies of all ads, images, and emails
16 on Backpage.com at the time the website was shutdown, and will provide them with
17 payment processing data, they still request the government image and produce copies of
18 all remaining server data in its possession. (*See CR 627 at 6.*) They make this demand for
19 irrelevant server data while asserting that it would take 8-16 months of full-time work to
20 examine the potentially relevant server data currently in their possession. “Barring
21 technical issues and assuming that these five servers were imaged correctly with no errors,
22 Defendants understand that it would take a forensic expert approximately 1,380-2,760
23 hours (8-16 months of full-time work) and untold cost to forensically analyze the data
24 contained on the 56 hard drives alone.” (*CR 627 at 8.*) Given Defendants’ timeframe for
25 analyzing the potentially relevant server data currently in their possession, it is unclear why
26 they would request copies of extraneous server data other than as a trial delay tactic.

27 In any event, circuit courts have consistently held that requests for discovery must
28 be reasonable and not place undue burden on the government. The discovery motion could

1 very well be viewed as a “fishing expedition,” in the hope that some favorable evidence
2 would turn up. Such “general descriptions of the materials sought and conclusory
3 arguments as to their materiality have been rejected repeatedly as insufficient under Rule
4 16(b).” *See United States v. Marshall*, 532 F.2d 1279, 1285 (9th Cir. 1976) (internal
5 quotations omitted). The reasonableness requirement of the Rule demands that “a request
6 for documents must not be unduly burdensome to the Government, and, equally important,
7 must be framed in sufficiently specific terms to show the Government what it must
8 produce.” *United States v. Ross*, 511 F.2d 757, 763 (5th Cir. 1975).

9 Here, like *Marshall*, Defendants’ request for the government to image and produce
10 irrelevant server data would be nothing less than a fishing expedition—that is even if they
11 could review these tens of millions of immaterial records in the months leading up to trial.
12 As articulated in the government’s May 31, 2019 status report, because of the high degree
13 of redundancy built into the Backpage servers, copying immaterial and redundant server
14 data would be an unduly burdensome and very expensive undertaking, not to mention a
15 waste of limited resources. (*See* CR 626-4 at 6-7.)

16 For example, the government’s computer forensics experts estimate that imaging
17 the remaining approximately 650 terabytes of immaterial server data would cost
18 approximately \$250,000. This estimate includes the cost of purchasing storage equipment
19 to process this large amount of data. Moreover, it would take approximately six months
20 for the government to image this extraneous server data and make copies available to
21 Defendants. Given the undue burden and expense of imaging the nearly 650 terabytes of
22 immaterial data—data Defendants admit they could not come close to analyzing prior to
23 trial given their 8-16 month timeframe to analyze the 56 hard drives currently in their
24 possession—their demand for imaged copies of the remaining server data should be denied.

25 However, as an alternative, if the Court consents, the government would be willing
26 to image the remaining immaterial server data at Defendants’ expense. Although Rule 16
27 only requires the government make discovery available to Defendants to inspect and copy,
28 the government has produced all discovery and potentially material server data in the case

1 to Defendants at its own expense. Consequently, if Defendants want the 650 terabytes of
2 immaterial server data, they (not the government) should bear the production cost.

3 **III. BRADY DOES NOT REQUIRE THE GOVERNMENT CULL THROUGH
4 DISCOVERY TO SINGLE OUT POTENTIALLY EXONERATORIAL
EVIDENCE.**

5
6 Despite the government providing Rule 16 discovery and any server data that could
7 remotely be material to assist Defendants in preparing their defense, Defendants continue
8 to make unreasonable demands for additional materials about Backpage's moderation
9 practices, certain victim ads, the Backpage website generally, Backpage's aggregation
10 practices, and Backpage's involvement in reciprocal link programs. (Mot. at 15-25.) In
11 asserting their demands, they contend that "the government's counsel said plainly and
12 repeatedly that they would extract and provide data and information from Backpage's
13 servers if only Defendants would identify what they need," but "the government has
14 refused to produce anything." (Mot. at 12-13.)

15 As expressed in the government's May 10, 2019 letter to Defendants, what the
16 government has repeatedly asked them is to identify material server data that the
17 government has not produced besides the millions of ads, images, and emails that have
18 been previously produced and payment processing data that will be produced when the
19 imaging process is complete. (*See* May 10, 2019 letter, Exhibit C.) Defendants failed to
20 identify any additional material server data, all the while complaining that "searching
21 through thousands of pages of [hot] documents to attempt to line them up to the allegations
22 in the indictment is an arduous, burdensome, and time-consuming task that [they] should
23 not have to do." (CR 643-2 at 5.) Yet, they expect the government to cull through
24 discovery to identify materials that may be helpful to its defense, placing the government
25 in the untenable position of having to prepare both sides of the case at once. This is a
26 demand courts (including the district court in this case) have rejected. (*See* Judge Logan's
27 October 15, 2018 Order Denying Defendants' Motion for Itemization of Brady/Giglio
28 Material; CR 339 at 5 ("The government is under no general obligation to identify *Brady*

1 or *Giglio* material within voluminous discovery); *Rhoades v. Henry*, 638 F.3d 1027, 1039
 2 and n.12 (9th Cir. 2011) (the government is not “obliged to sift fastidiously” through
 3 millions of pages (whether paper or electronic)); *United States v. Warshak*, 631 F.3d 266,
 4 297 (6th Cir. 2010). The government is “under no duty to direct a defendant to exculpatory
 5 evidence [of which it is unaware] within a larger mass of disclosed evidence.” *United*
 6 *States v. Skilling*, 554 F.3d 529, 576 (5th Cir. 2009).

7 As articulated above, the government is neither responsible for preparing
 8 Defendants’ defense nor in a better position than Defendants to identify exculpatory
 9 material. Nevertheless, a review of the “hot” documents provided in the case details much
 10 of what Defendants demand the government cull through discovery to locate.

11 **A. The Government’s “Hot” Documents Provide Extensive Insight Into**
 12 **Backpage’s Moderation Practices.**

13 Paragraphs 68-152 of the superseding indictment detail Backpage’s moderation
 14 practices and are corroborated by “hot” documents provided to Defendants in the case.
 15 (*See* CR 230 at 16-37.) For instance, paragraph 78 of the superseding indictment alleges
 16 that on October 16, 2010, former Backpage Operations Manager Defendant [Andrew]
 17 Padilla sent an email with two attachments to a large group of Backpage employees on how
 18 to moderate ads. The aforementioned email and attachments were sent as part of the
 19 government’s July 19, 2018 “hot” document production to Defendants. (*See* DOJ-BP-
 20 0004601386, DOJ-BP-0004602109, and DOJ-BP-0004601051.)

21 Similarly, paragraph 100-101 of the superseding indictment alleges that on April
 22 27, 2011, Defendants [Michael] Lacey and [Scott] Spear received a set of recommended
 23 action items from a firm Backpage had hired to assist it with “internet safety” issues.
 24 Among other action items, the firm warned Lacey, Spear, and other Backpage personnel
 25 that certain terminology was often used by pimps who shuttle children to different locations
 26 where they do not know anyone and cannot get help. Backpage disregarded these
 27 recommendations by continuing to publish ads that contained this terminology.
 28 Documents corroborating these allegations were sent as part of the government’s

1 September 24, 2018, “hot” document production to Defendants. (See DOJ-BP-
2 0004602509-DOJ-BP-4602512.)

3 These are merely two of numerous “hot” documents about Backpage’s moderation
4 practices that support the allegations contained in the superseding indictment.
5 Consequently, not only has the government provided Defendants millions of pages of
6 discovery that includes the requested “data from Backpage’s systems to show the website’s
7 actual [moderation] practices,” (Mot. at 15) it has given them more than 2,200 “hot”
8 documents that detail Backpage’s moderation practices.

9 Additionally, Defendant’s citation to language included in a search warrant affidavit
10 as evidence that the government has not complied with its discovery obligations is baseless.
11 (Mot. at 3-4 and 16.) Specifically, Defendants assert that “in [the government’s] April
12 2018 search warrant application ..., the government represented that these servers contain
13 current and historical content of the ads that were posted on Backpage ...all versions of an
14 advertisement ..., it was on that basis the magistrate judge granted the government’s
15 application to seize the servers.” (Mot. at 3-4.) Not only is this assertion inaccurate, it is
16 beside the point. While the Fourth Amendment requires a factual showing sufficient to
17 comprise probable cause to issue a search warrant, this does not mean that every fact recited
18 in the warrant affidavit is necessarily correct, for probable cause may be founded upon
19 hearsay and upon information received from informants, as well as upon information
20 within the affiant’s own knowledge. *Aguilar v. Texas*, 378 U.S. 108, 114-115 (1964) (“A
21 warrant affidavit must set forth particular facts and circumstances underlying the existence
22 of probable cause, so as to allow the magistrate to make an independent evaluation of the
23 matter”); *see also United States v. Leon*, 468 U.S. 897, 922 (1984) (“finding officers’
24 reliance on warrant was objectively reasonable”; the “judge was not misled by information
25 in the affidavit, he did not abandon his judicial role, and the affidavit was certainly not
26 lacking probable cause as to render belief in its existence unreasonable”). Here, certainly
27 Defendants do not contend the magistrate lacked probable cause to issue the warrant—a
28 warrant that included as an attachment a 61-page indictment issued just a week before by

1 an Arizona grand jury charging Defendants with 93 counts of conspiracy, facilitating
 2 prostitution and money laundering for their work at Backpage.com. (*See CR 3.*) Not to
 3 mention the fact that Backpage’s co-founder and CEO as well as several Backpage-related
 4 corporate entities had pleaded guilty to conspiring to facilitate prostitution and money
 5 laundering just days before the warrant was issued. 2:18-cr-00464, CR 7, April 5, 2018
 6 (D. Arizona 2018); 2:18-cr-000465, CR 8, April 5, 2018 (D. Arizona 2018).

7 More importantly, the government’s compliance with its Rule 16 obligations (the
 8 subject of this motion) is not premised on language included in a search warrant. While
 9 the government may have had a good-faith belief at the time the warrant affidavit was
 10 drafted that the server data would contain “all versions of an advertisement,” as plainly
 11 articulated in the government’s May 31, 2019 status report, there was no “versioning” built
 12 into Backpage’s databases—meaning changed text in an ad would not have a version saved
 13 from before the change. Thus, the changed text would be the new data. (*See CR 626-4 at*
 14 *13.*) Additionally, Defendants’ citation to bits and pieces of this section in the
 15 government’s status report asserting that “[the government] confirmed that the databases
 16 contained all underlying data relating to a given ad, including: any ‘filters that were applied
 17 to ads,’ ‘[m]oderation changes or actions that would apply to all ads,’ moderator action
 18 logs, ‘[i]mages that were deleted by a moderator,’ and the original versions of ads posted
 19 to Backpage.com”—while conveniently failing to reference the lack of “versioning” built
 20 into Backpage’s databases—very obviously mischaracterizes this section of the
 21 government’s status report. (Mot. at 4.) The bottom line is that the government cannot
 22 create data Defendants contend may be useful to their defense, nor do the rules require the
 23 government to do so. Defendants have been provided all Rule 16 discovery in the
 24 government’s possession regarding Backpage’s moderation practices.⁴ It is the Defendants

26 ⁴ As per the Scheduling Order, any additional records obtained during pre-trial preparation
 27 shall be disclosed to Defendants as soon as possible. (CR 121, p.1 at 27-28 (“If additional
 28 records are discovered by, or disclosed to, the government during pre-trial preparation or
 otherwise, pursuant to Rule 16(c), Fed. R. Crim. P., the government shall promptly disclose
 any additional documentary evidence or materials to the defense as soon as practicable

1 responsibility—not the government’s—to analyze this evidence and prepare their case for
 2 trial.

3 **B. Defendants Have Been Provided Victim Ads Referenced in the
 4 Superseding Indictment.**

5 The government has fully complied with its discovery obligations as it relates to
 6 victim ads. As previously stated, not only did the government specifically identify and
 7 provide Defendants victim ads referenced in the superseding indictment nearly eight
 8 months ago, it has also provided Defendants with victim ads (including underlying ad data)
 9 as they appear in the Backpage server data. (*Supra* at 7.) Thus, Defendants’ assertion that
 10 the government “think[s] it is sufficient to produce some copies of these [victim] ads but
 11 not the underlying data about the ads or other related ads or Backpage’s actual actions
 12 concerning the ads” lacks merit. (Mot. at 11.)

13 Defendants’ citation to a May 1, 2018 letter from former attorney for Defendant
 14 Padilla (Mot. Exhibit F) asserting “[they] raised concerns about the need to preserve the
 15 Backpage systems and data intact three weeks after this case began” is also unavailing.
 16 (Mot. at 21.) The government has preserved and produced all discovery (including victim
 17 ads) to Defendants in the same condition it was “seized and received by the government,”
 18 and has “take[n] all steps to maintain its integrity.” (Mot. at Exhibit F.) As the letter
 19 correctly indicates, the government produced discovery to Defendants in the same
 20 condition it was seized and received, which is the government’s standard practice. (*Id.*)
 21 What Defendants are demanding the government do now is modify or convert the server
 22 data to a format preferable to them. The government is not required (nor can it in this case)
 23 produce discovery to Defendants in a format it does not possess. The primary point here
 24 is that the government provided Defendants with Rule 16 discovery (to include victim ads
 25 referenced in the superseding indictment) in the same format it was received.

26
 27 _____
 28 after such disclosure or discovery occurs.”).)

1 **C. The Government Has Produced Discovery in its Possession Regarding**
2 **the Backpage.com Website.**

3 The government has provided Defendants all Rule 16 discovery and server data in
4 its possession regarding the Backpage.com website that is material to preparing their
5 defense. These materials include Defendants' demands for "ads and ad revenue as a
6 whole," information regarding "Backpage's referrals to NCMEC," and "Backpage's
7 purported "cooperation with law enforcement." (Mot. at 18-19.) Not only has the
8 government provided more than 10 million pages of discovery with accompanying indices
9 to Defendants about the Backpage website, it has gone to great lengths to ensure that these
10 materials were organized and searchable. The 90-page superseding indictment, the more
11 than 2,200 "hot" documents, and *Jencks* statements disclosed to Defendants also provide
12 an abundance of information about the Backpage website. Again, what Defendants are
13 requesting is that the government cull through discovery and pull out information they
14 consider helpful to their defense, a demand the law does not require.

15 **D. The Government Has Produced Discovery in its Possession Regarding**
16 **Backpage's Aggregation Practices and Reciprocal Link Program.**

17 Defendants have been provided discovery regarding Backpage's aggregation
18 practices and reciprocal link agreements. For example, among other things, on September
19 24, 2018, the government disclosed to Defendants 400 pages of Backpage meeting agendas
20 that give insight into Backpage's aggregation practices. (*See* September 24, 2018
21 discovery transmittal letter, Exhibit D.) *Jencks* statements from former Sales and
22 Marketing Director Dan Hyer (disclosed to Defendants more than 14 months before trial)
23 also detail Backpage's aggregation and content creation practices. (*See* CR 524, Exhibit
24 A.) Also, the government's January 23, 2019 response to Defendants' January 18, 2019
25 joint status report (CR 443) provides evidence of Backpage's relationships with certain
26 prostitution websites. (*See* CR 446 at 11-12; 446-1 at 40-62, 65-69, and 70-72.)
27 Additionally, the "hot" documents provide emails and supporting materials regarding
28 Backpage's ongoing relationships with prostitution websites, to include The Erotic
Review.

1
2 **CONCLUSION**
3

4 Based on the foregoing, the Motion to Compel Discovery (CR 643) should be
denied.
5

6 Respectfully submitted this 15th day of July, 2019.
7

8 BRIAN BENCZKOWSKI
Assistant Attorney General
Criminal Division, U.S. Department of Justice
9

10 *s/Reginald E. Jones*
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U.S. Department of Justice, Criminal Division
Child Exploitation and Obscenity Section
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12 MICHAEL BAILEY
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Assistant U.S. Attorneys
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CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2019, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the CM/ECF registrants who have entered their appearance as counsel of record.

s/ Angela Schuetta
Angela Schuetta
U.S. Attorney's Office

Exhibit A

From: [Jones, Reginald \(CRM\)](#)
To: ["Whitney Bernstein"](#)
Cc: [Tom Bienert](#); [Toni Thomas](#)
Subject: RE: Updated Exhibit List with Bates Numbers
Date: Friday, May 31, 2019 8:07:20 PM
Attachments: [DWT september 2017 letter to government.pdf](#)
[May 2018 discovery transmittal letter.pdf](#)

Hi Whitney:

It's a bit surprising that your firm was not aware of the source of the DOJ-AZGJ docs as Defendant Larkin is being jointly represented in this case by your firm and the firm Davis Wright Tremaine. DWT represented Backpage in the Arizona GJ litigation (and has been representing the BP Defendants in various civil and criminal litigation since 2012) and was compelled to produce to the government the DOJ-AZGJ Bates labeled docs. DWT Bates labeled the docs beginning in DOJ-AZGJ and turned them over to us in September 2017. See the attached letter from DWT to the government. Additionally, the discovery documents DWT Bates labeled with beginning prefix DOJ-AZGJ are clearly labeled next to the DOJ-BP Bates number in the discovery we produced to your firm than a year ago with accompanying indexes USAO 108 Subpoena and USAO Subpoena Supplemental (DWT was compelled to comply with USAO 108 Subpoena which is why the indexes are labeled as such.) See May 2018 discovery transmittal letter from the government to your firm attached. In addition, Dan Quigley (who appears to be some type of consulting attorney for Larkin and Lacey) was also presumably familiar with this discovery and he has represented Lacey and Larkin in some type of capacity since 2015. As you know, he has been present for court appearances and on telephonic conferences pertaining to discovery in this case.

As to your second question, the government will be providing an update regarding the Backpage servers shortly.

Best,
Reggie

From: Whitney Bernstein [mailto:wbernstein@bienertkatzman.com]
Sent: Wednesday, May 29, 2019 8:42 PM
To: Jones, Reginald (CRM) <Reginald.Jones@CRM.USDOJ.GOV>
Cc: Tom Bienert <tbienert@bienertkatzman.com>; Toni Thomas <tthomas@bienertkatzman.com>
Subject: RE: Updated Exhibit List with Bates Numbers

Reggie:

Thank you for sending that promised list, and we look forward to hearing from the government with the outstanding identifications. Thank you as well for clarifying the Bates labeling, especially as we were not aware of the source of the documents. Please advise which discovery production contains the documents labeled DOJ-AZGJ. As the government well knows, our firm did not come into this case until May 2018 and was not involved in any discovery productions to the government or related litigation prior to that date.

Relatedly, as I'm sure you saw in my email to you earlier today, please advise as to whether you have the outstanding approximately 60 servers from Amsterdam.

Thank you,

Whitney

Whitney Z. Bernstein | Attorney
Bienert | Katzman PC
Tel.: (949) 369-3700
www.bienertkatzman.com

From: Jones, Reginald (CRM) <Reginald.Jones4@usdoj.gov>
Sent: Wednesday, May 29, 2019 2:55 PM
To: Paul Cambria <pcambria@lglaw.com>; Tom Bienert <tbienert@bienertkatzman.com>; Ariel A. Neuman <aneuman@birdmarella.com>; Bruce Feder <bf@federlawpa.com>; Whitney Bernstein <wbernstein@bienertkatzman.com>; Erin E. McCampbell (emccampbell@lglaw.com) <emccampbell@lglaw.com>; 'gpanchapakesan@birdmarella.com' <gpanchapakesan@birdmarella.com>; gpanchapakesan@birdmarella.com; glincenberg@birdmarella.com; 'joyous@mailbag.com' <joyous@mailbag.com>; 'david@deisenbergplc.com' <david@deisenbergplc.com>
Cc: Rapp, Kevin (USAAZ) <Kevin.Rapp@usdoj.gov>; Perlmeter, Margaret (USAAZ) <Margaret.Perlmeter@usdoj.gov>; Kozinets, Peter (USAAZ) <Peter.Kozinets@usdoj.gov>; Stone, Andrew (USAAZ) <Andrew.Stone@usdoj.gov>; Kucera, John (USACAC) <John.Kucera@usdoj.gov>
Subject: RE: Updated Exhibit List with Bates Numbers

Dear Counsel:

Please find attached an updated and revised preliminary exhibit list with DOJ-BP Bates numbers for approximately 90% of the government's exhibits. We'll continue to periodically provide you with an updated and revised preliminary exhibit list in the coming weeks. (This will include adding DOJ-BP Bates numbers for the approximately 10% of documents that do not already contain a DOJ-BP Bates number.)

Additionally, approximately 20 out of the nearly 1,100 exhibits contain a Bates prefix of DOJ-AZGJ. As you are aware, documents beginning with prefix DOJ-AZGJ are documents Backpage Defendants Bates labeled and provided to us in September 2017 and we subsequently re-disclosed to you. (Backpage Defendants also previously provided these documents to the U.S. Senate Permanent Subcommittee on Investigations in 2016 as part of its investigation into Backpage.) Nevertheless, we will update the DOJ-AZGJ Bates numbered documents on the exhibit list with the corresponding DOJ-BP Bates numbers and provide the updated Bates numbers to you in the coming weeks.

Thanks,
Reggie

Reginald E. Jones

U.S. Department of Justice, Criminal Division

T: 202.616.2807 | reginald.jones4@usdoj.gov

Exhibit B



U.S. Department of Justice

United States Attorney
District of Arizona

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Main Fax: (602) 514-7693

November 30, 2018

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Gary Lincenberg
Bird, Marella, Boxer, Wolpert,
Nessim, Drooks, Lincenberg & Rhow,
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1875 Century Park East
23rd Floor
Los Angeles, CA 90067
(attorney for Jed Brunst)

Re: U.S. v. Michael Lacey, et.al.
CR-18-00422-PHX-SPL (BSB)

Dear Counsel:

Pursuant to your request for discovery and the government's obligations under Fed. R. Crim. P. 16 and the stipulated scheduling order in this case, please find enclosed a DVD and Thumb Drive containing the government's sixth disclosure.¹ The DVD contains the following Bates Stamped records:

¹ A thumb drive containing disclosure for defendants Michael Lacey, James Larkin, and Jed Brunst are being provided to Paul J. Cambria Jr., Thomas H. Bienart Jr., and Gary Lincenberg respectively.

Lacey, et. al. Discovery Letter 6

November 30, 2018

Page 2

- Additional Superseding “Hot Docs” – DOJ-BP-0004685806 to DOJ-BP-0004685877
- Backpage Historical Ads – DOJ-BP-0004685878 to DOJ-BP-0004688678
- Erick Bauer Civil Case – DOJ-BP-0004688679 to DOJ-BP-0004688928
- John Becker Documents – DOJ-BP-0004688929 to DOJ-BP-0004691714

The Thumb Drive contains the following Bates Stamped records:

- Additional California Department of Justice – DOJ-BP-0004691715 to DOJ-BP-0004700499²
- Additional Financial Records – DOJ-BP-0004700500 to DOJ-BP-0004716582
- Additional Search Warrants and Affidavits – DOJ-BP-0004716583 to DOJ-BP-0004719327
- Additional Victim Records – DOJ-BP-0004719328 to DOJ-BP-0004719709
- WDMA BP GJ Transcripts – DOJ-BP-0004719710 to DOJ-BP-0004720536

Please call with any questions or concerns.

Sincerely,

BRIAN BENCZKOWSKI
Assistant Attorney General
Criminal Division
U.S. Department of Justice

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Enclosures

² Amazon Web Service data and Virtual Machine data obtained from California DOJ were not loaded in Relativity. This data will be produced upon request.

Exhibit C



U.S. Department of Justice

**United States Attorney
District of Arizona**

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May 10, 2019

Via E-Mail

Whitney Z. Bernstein
Bienart, Miller & Katzman PLC
EMail:wbernstein@bmkattorneys.com
(attorney for Defendant James Larkin)

Re: Your letter of April 25, 2019

Dear Ms. Bernstein:

We write in response to your April 25, 2019 letter. To start, on July 19, 2018, the government disclosed more than 1,070 pages of documents it believes support the allegations contained in the indictment. *See* government letter to defense with accompanying index entitled *Backpage “Hot Docs”* – Bates Stamped Records DOJ-BP-0004601039-DOJ-BP-0004602110. Moreover, on September 24, 2018, the government disclosed an additional more than 340 pages of documents it believes support the allegations contained in the superseding indictment. *See* government letter to defense with accompanying index entitled *Backpage Superseding Indictment “Hot Docs”* – Bates Stamped Records DOJ-BP-0004602508-DOJ-BP-0004602851. Also, on November 30, 2018, we disclosed to you an additional 70 pages of documents we believe support the allegations contained in the superseding indictment. *See* government letter to defense with accompanying index entitled *Additional Superseding “Hot Docs”* – Bates Stamped Records DOJ-BP-0004685806-DOJ-BP-0004685877. Enclosed with the November 30, 2018, *hot docs* disclosure we also provided you with victim ads referenced in the superseding indictment. *See* government letter to defense with accompanying index entitled *Additional Victim Records* – Bates Stamped Records DOJ-BP-0004719328-DOJ-BP-0004719709.

These comprehensive disclosures included, to our knowledge, emails, ads, and other internal Backpage documents that are referenced in the superseding indictment. It is therefore surprising to hear you contend that “we are not aware of where the government has identified the indictment referenced documents, i.e., providing Bates numbers or copies of each document quoted or mentioned in the Indictment.”

In regard to your second request for Bates numbers of “documents identified in the government’s exhibit list,” – the government will provide Bates numbers for documents identified on the preliminary exhibit list it provided Defendants on April 1, 2019, as soon as practicable.

Concerning your third request, your assertion that “you [I] reiterated in court that the government has asked Defendants to identify particular areas of disclosure requested so the government may prioritize discovery” is incorrect. What the government has repeatedly asked Defendants in both verbal and written communications (*see* my April 10, 2019, email to you) is to provide it specific server data – other than the marketplace of ad, image, and email data we imaged and made available to you on March 7, 2019 (and payment processing data we will make available to you when we receive it via the MLAT process) – that you believe is material to your defense. You have not identified any such additional data.

Regarding your fourth request “for the government’s position on the Jencks Act materials” – the government has complied with the Scheduling Order and produced all Jencks Act material in its possession (except Carl Ferrer’s Jencks statements) to Defendants.¹ In accordance with the Scheduling Order, if we obtain additional Jencks Act material, we will disclose those materials to you as soon as practicable. *See CR 121; p.2, footnote 3.* (“If the government obtains any additional written Jencks material after this date [02/25/19], this Jencks material shall be produced promptly to the defense as soon as practicable.”)

Also, we will provide Daniel Hyer’s cooperation addendum to you next week, and we will provide Carl Ferrer’s cooperation addendum to you on or before June 25, 2019.

Additionally, see below responses concerning your fifth request for an update as to the items you requested in your April 17, 2019 letter to me:

¹ As per the Court’s April 22, 2019, Order (CR 535), the government will disclose any Jencks Act statements of Carl Ferrer on or before June 25, 2019. As you know, the Jencks Act requires the government produce statements that have been adopted by a witness *after* the witness testifies. 18 USC §3500(e)(1); *See also United States v. Jackson*, 978 F.2d 903, 913 (5th Cir.1992)(“To adopt a statement under the Jencks Act. . . a witness must read the entire statement and formally approve the statement.”) *United States v. Newman*, 849 F.2d 156, 160 (5th Cir.1988) (Witness did not adopt a DEA report when he told the DEA agent that he did not disagree with anything in the report.).

- 1) Request: "We need imaged copies of the remaining nine servers located in Pocatello."²

Response: As previously requested, could you please identify what server data that the government has not made available to you (other than the payment processing data) that you believe is material to your defense.³ See Federal Rules of Criminal Procedure Rule 16(a)(1)(E). Backpage operated as a classified advertising website for nearly a decade and a half so we are certain that Defendants—as owners and executives of the company—are aware of the data hosted on the website. Also, we are currently working to provide you with additional information regarding the servers currently in the government's possession as well as the outstanding servers we await receipt of from Amsterdam via the MLAT process to further assist you in this process. We should have this information to you within the next few weeks.

- 2) Request: Provide "pictures of the servers located in Pocatello."

Response: See pictures of the servers located in Pocatello attached.

- 3) Request: Provide "pictures of all servers in their native state, the way they were set up when they were running in their racks at the facilities."

Response: To the government's knowledge, there were no pictures taken of the servers as they were running at the Dallas or Amsterdam facilities. You should receive pictures of the servers from Tucson via FedEx next week.

- 4) Request: Provide "a copy of the one page form from the Dutch police."

Response: Requested form and accompanying FBI report of interview attached.

In regard to your sixth request, as articulated above, as well as in our March 7, 2019, letter to you, our April 10, 2019 email to you, and in our status memorandum filed on April 16, 2019, the government will notify you when the remaining servers from Amsterdam are in its possession and available for inspection. Moreover, as it pertains to my April 10, 2019, email to you, I cite to Rule 16 of the Federal Rules of Criminal Procedure in stating that Backpage server data would be available to inspect and copy because Rule 16(a)(1)(E) makes clear that, "on a defendant's request, the government must permit the defendant to inspect ... data ... tangible objects ... or copies or portions of any of these items, if the item is within the government's possession, custody, or control" and "the item is material to preparing the defense." I emphasized inspect and copy to highlight to you an inaccurate statement you

² On April 25, 2019, you requested the government also provide you with imaged copies of the servers and hard drives located in Phoenix. Our response incorporates both your April 17, 2019, and April 25, 2019, requests.

³ As previously noted, we will provide you with the payment processing server data as soon as it is received from Amsterdam.

asserted in your April 8, 2019, email to me. Specifically, you contended that I indicated to you that “no court order is needed to be able to inspect, view, turn on, manipulate, copy, etc. the servers—just that the forensic FBI people would need to supervise the process; and that regarding imaging of any servers, we can coordinate that process once we identify the servers we’ll need imaged copies of.” I do not recall making any such statement and hope that you did not understand any of our verbal communications to imply that the government would allow data manipulation (i.e., adding, deleting, and/or updating data in a database) of the servers.

In any event, if you could show the government what additional server data located in Pocatello and Phoenix is material to your case, in accordance with Rule 16(a)(1)(E), we would provide you with imaged copies of that data. As you are aware, a showing of materiality requires, among other things, that the disclosure of the information sought would enable you to significantly alter the quantum of proof in your favor.

Please reach out with additional questions. We will continue to work with you over the course of the next months leading up to trial to answer them and facilitate your review of relevant material in the case.

BRIAN BENCZKOWSKI
Assistant Attorney General
Criminal Division
U.S. Department of Justice

s/Reginald E. Jones
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Exhibit D



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September 24, 2018

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Re: U.S. v. Michael Lacey, et.al.
CR-18-00422-PHX-SPL (BSB)

Dear Counsel:

Pursuant to your request for discovery and the government's obligations under Fed. R. Crim. P. 16 and the stipulated scheduling order in this case, please find enclosed a thumb drive

Lacey, et. al. Discovery Letter 1

September 24, 2018

Page 2

containing the government's fourth disclosure.¹ The thumb drive contains the following Bates Stamped records:

- Backpage Agendas – DOJ-BP-0004602111-DOJ-BP-0004602507
- Backpage Superseding Indictment “Hot Docs” – DOJ-BP-0004602508-DOJ-BP-0004602851
- Co-Star “Hot Docs” – DOJ-BP-0004602852-DOJ-BP-0004602926
- Financial Records – DOJ-BP-0004602927-DOJ-BP-0004683544

Please call with any questions or concerns.

Sincerely,

BRIAN BENCZKOWSKI
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JOHN J. KUCERA
Special Assistant U.S. Attorney

Enclosures

¹ A thumb drive containing disclosure for defendants Michael Lacey, James Larkin, and Jed Brunst are being provided to Paul J. Cambria Jr., Thomas H. Bienart Jr., and Michael Kimerer respectively.